

3 1761 11708757 7

Government
Publications

Copyright in Canada: Proposals
for a revision of the law.
(Summary)

CAI

RG

-770518

COPYRIGHT IN CANADA: PROPOSALS FOR A REVISION OF THE LAW

SOURCE OF THE PAPER

The paper proposing revisions to Canadian copyright legislation was prepared for the Bureau of Intellectual Property by consultants, following discussions and consultation with the private and public sectors and the consideration of briefs submitted to the Department. It is the third in a series as part of a program to update and revise intellectual property legislation on patents, trade marks, copyright and industrial design.

STATUS OF THE PAPER

The study presents recommendations for revising the law. The recommendations are not governmental or departmental policy. The government may, in response to reaction, adopt a viewpoint for copyright law revision varying significantly from the proposals of the paper.

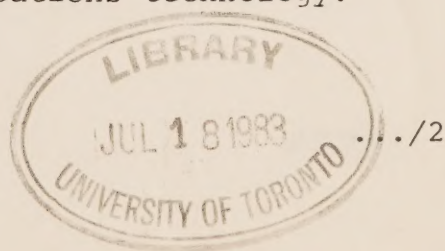
Although it contains specific recommendations for revision, they are presented in order to elicit debate and reaction on the fundamental policy and substantive issues involved, as well as the technical structure of the law.

A major consideration is that the complexity and sensitivity of the issues require thorough airing and discussion before solutions based on compromise can be reached. Thus, a draft law can only be devised after reaction to the paper is received.

COPYRIGHT DEFINED

Copyright consists of a bundle of exclusive rights, provided by statute, to do, and to authorize the doing of, certain acts in relation to protected material for a specified period of time, usually the life of the author and 50 years thereafter. The law protects the literary, dramatic, musical and artistic works of creators from being copied, performed, broadcast or adapted. These rights are divisible (by media, use, time or territory) and may be sold or licensed accordingly.

The scope and nature of copyright has changed over time because of technological change and social development. Originally reflective of a printing press technology, the principles of copyright require adapting to a communications technology.



HISTORICAL BACKGROUND

The last revision of the copyright law occurred in 1921, and Canada's present Copyright Act came into force on January 1, 1924. The law, solely within federal jurisdiction, is largely traditional in form, providing an author and his or her heirs with 50 years of copyright protection after the author's death. The existing Canadian law was closely modelled on the law of the United Kingdom.

Efforts to revise Canada's copyright law have been sporadic: the Ilesley Royal Commission published a report in 1957 proposing Canada adopt a law along the lines of the U.K. Act of 1956. In 1966, (while the Ilesley proposals were being reviewed) the federal government requested the Economic Council to study intellectual property law, including copyright, in the light of long-term economic objectives.

When the Economic Council's Report on Intellectual and Industrial Property was issued in 1971, it dealt in detail with the economic rationale of a copyright law. It made major proposals that attracted considerable attention.

The Economic Council stressed the economic importance of copyright, changing technology and international trade. The Council emphasized the net-importer status of Canada and the non-discriminatory nature of the international copyright conventions.


The Council stressed the need to secure for creators returns for the use made of their material, but found no evidence to justify substantial increases or decreases in levels of protection, except for lateral extension for new media.

It is against the background of these developments that this paper has been prepared.

GENERAL CONSIDERATIONS

The first part of the paper provides a context for revision. On the basis of a general review of the background facts and issues relevant to the copyright issues, the fundamental issue of what the extent and scope of a new copyright law should be is raised.

The paper suggests that it would be unrealistic to extend the scope of Canadian copyright law, without considering the costs and benefits of each change.



Digitized by the Internet Archive
in 2023 with funding from
University of Toronto

<https://archive.org/details/31761117087577>

Canada currently allows foreign participation in its copyright law as part of its obligations under the international copyright conventions, on the assumption that Canadians are benefitting by obtaining protection abroad. Statistics given in the paper, suggest that royalties generated in Canada are, in great measure, leaving the country. The net importer status of Canada is a prime determinant of the extent to which changes can be envisaged in domestic law.

The paper concludes that it would not be in Canada's interest to accede to later texts of the international copyright conventions, which impose greater obligations resulting in an even greater outflow of royalties.

Within the larger international constraint the paper provides a rationale for revision of the copyright law, by taking into account the reasons for revision: technological developments, antiquity of the law and the emergence of new rights and new subject matter.

GENERAL APPROACH OF THE PAPER

Certain major areas of concern have been identified in the paper: (i) the polarization between those advocating increased protection and those seeking easier, and perhaps free, access to copyright material; (ii) the effects of technology which have created new uses and new "rights" for protected material; (iii) the necessity of striking a balance among conflicting interests; (iv) the concomitant need to regulate and control the exercise of copyright in Canada.

It is self-evident that without a sufficient degree of protection, creative activity may decline, but where there is insufficient regulation of the exercise of exclusive rights, the public may be subject to unwarranted restrictions. The difficulties lie in attempting to reach an equitable balance.

In general, the recommendations in the paper envisage that the rights of creators will not increase nor will the exceptions to the rights of creators be increased measurably. The paper, however, does recommend the deletion of certain exceptions on various grounds.

The unfettered exercise of copyright on an individual basis, appropriate for an age prior to communication technology, may no longer be entirely appropriate. Accordingly, recommendations are made to enable the collective exercise of copyright, thereby according users easier access to copyright material and providing creators an easily determined royalty fee.

Collectives, exercising rights of individuals, are also urged as being an answer to the demands of owners that the state police their rights. Moreover, the establishment of collectives will hopefully reduce materially the complaints of users with respect to the difficulties of achieving access to copyright material.

The collective exercise of rights, with a system of royalty fees arrived at through licences, indicates that it would be possible to arrange for a large degree of accommodation between the impact of technology and the preservation of authors' rights. Thus, it would be possible to preserve the exclusive economic and moral rights of creators and, at the same time, accommodate the effects of technology.

In such a system a regulatory mechanism is necessary: to hear sides, set rates and conditions. The proposed regulatory mechanism, the Tribunal, would, in addition to its regulatory function, have a reallocative effective in ensuring royalties are distributed to those for whom they are generated, whether by collective or compulsory provisions.

THE MAIN ISSUES OF REVISION

In large these have been identified as:

1. the confrontation between those seeking increased and longer protection, and those who wish to have less protection and easier access to copyright material; i.e. the extent and scope of rights
2. the effects of technology and social change, which have created new uses for copyright works and demands for new rights, for instance: cablevision, computer storage and retrieval, public lending right, performers' rights;
3. the extent to which it will be necessary for the government to regulate and control the exercise of copyright in order to reach an equitable balance among conflicting interests.

Certain conclusions are derived in the paper which are formulated as general recommendations:

1. That Canada remain at the present level of international participation in respect of the Berne Convention and the Universal Copyright Convention.

2. That Canada should, however, maintain the present level and extent of protection, taking into account social and cultural developments and, in particular:
 - a) opposing forces and views: i.e., to provide greater access to copyright material, yet increase the share of creators and authors in copyright returns; and to have regard for the interests of entrepreneurs as well as those of users (consumers) on an equitable basis; and
 - b) need to extend the scope of protection laterally to encompass new subject matter, new use of material, and associated matters.

These general recommendations are the central features of the study.

STRUCTURE OF THE PAPER

The paper is divided into four major parts and a conclusion:

Part I contains a background review of reasons and necessity for revision. It concludes by suggesting that Canada should maintain a law consistent with Canadian needs.

Part II presents an exposition and analysis of the economic magnitude and significance of copyright.

Part III applies the principles adduced in Part I to the particulars of a copyright law.

Part IV is devoted to administrative and regulatory matters.

SUMMARY OF THE PAPER

PART I

Part I identifies and discusses the need for revision, the function of copyright, the context of revision and the approach taken. It has as its purpose the presentation of a factual and philosophical background against which the basic questions concerning the context and scope of a copyright law can be raised.

The nature of copyright and its origins are summarily discussed, followed by a consideration of the changing importance of copyright within the Canadian experience. The Economic Council Report is reviewed in terms of its relevance and applicability to law revision, followed by a review of the main reasons for revision of the law: technological developments, the increasing antiquity and non-relevance of the law, and changes in social consciousness.

Part I emphasizes that the extent to which the scope of copyright owners' rights are limited, reflects, in part, a social balance of competing claims and interests. While creation and innovation must be rewarded, if not actively encouraged, the broad public interest must be taken into account.

The national elements to be taken into account in revising the law are diverse: the "copyright industries," e.g. publishing, broadcasting, film, recording; the creative community of authors, artists, composers; the intermediate agents of creators such as the performing rights societies and unions; consumers and organizations of users of copyright. Added to this mix are the effects of government policy in the areas of culture, communications and the arts; the impact of international trade; the social and economic aspects of technological development and innovation.

Certain basic principles are postulated to assist in determining the general position Canada should adopt with respect to a Canadian copyright law, i.e. Canada should strive to provide a milieu within which the development of national identity, taking into account economic development, can be fostered, but consistent with resources and the maintenance of cultural sovereignty.

Considerable emphasis is placed on the constraints imposed upon the degree of flexibility that can be exercised in revising the law. These constraints centre upon Canada's net-importer status. Of equal importance are the constraints imposed by the international copyright conventions, which dictate the minimum level of protection, in respect to convention subject matter, that must be provided in national law.

However, Part I points out that while the conventions restrict freedom of action, they do so only with respect to the subject matter required to be protected by those conventions. Whereas protection of "convention" matter must be on a basis of non-discrimination, material which is not required to be protected by the conventions can be protected by national law and solely for the benefit of Canadian creators. The extension of that protection to foreigners can be done on a basis of strict reciprocity, as necessary. Thus, the paper follows a course adopted in other countries, notably the United Kingdom, Australia and the USA.

Part I concludes with a summation and a statement of the main issues around which revision will coalesce. It is stated that Canada should maintain the present general level and scope of protection, while taking into account the impact of technology, the conflicting needs of creators, users and consumers, and the need for regulation and control of the exercise of copyright.

PART II

Part II establishes the economic importance of copyright, defines the copyright industries and the income generated by reason of the copyright law. Copyright industries contributed an estimated 1.7 billion dollars to the 1971 real gross domestic product. Part II incorporates an analysis and exposition of the economic significance of copyright and the effects of the rights accorded to nationals and those others who benefit from the law.

The paper suggests that it would be unrealistic to simply extend the scope of Canadian copyright law without considering the effects, as any increase can only benefit foreign owners. Canada currently allows foreign participation in its copyright law as part of its obligations under the international copyright conventions, on the assumption that Canadians are benefitting by obtaining protection abroad. Statistics demonstrate that royalties generated in Canada, are, in great measure, leaving the country, thus confirming that Canada is a net-importer of copyright material. Therefore, it is not in Canada's interest to accede to later texts of the international copyright conventions, as later texts impose greater obligations.

PART III

Part III applies in specific terms to particular issues, the general considerations derived from the discussion in Part I.

It uses the major distinction made in Part I by considering the protection of material required by the copyright conventions: Convention Material. This is followed by an examination of what protection should be accorded "non-convention" material. It then considers what "new rights" might be accorded to convention material. Finally, Part III reviews matters common to all protected subject matter

(a) Convention Material

These are the traditional subjects of protection, original literary, dramatic, musical and artistic works, (e.g. books, plays, pop songs, sculpture and painting) and no fundamental change is recommended. The treatment of original works embraces their definition, conditions of acquiring copyright, and with the pecuniary or exploitative rights to be given to creators. The non-pecuniary rights of authors, the doctrine of moral rights, or droit moral, are examined and are the subject of a recommendation to recognize their importance and give them equal weight with pecuniary rights.

With respect to the duration of copyright it is proposed that, in general, as to published works it remain largely unchanged: life of the author and 50 years thereafter, for original works. Certain variations of the rule are necessary. It is, for example, proposed that the measurement of the term of 50 years after the death of the author should be computed not from the date of death, but from the end of the year in which death took place.

In respect of literary, dramatic and musical works not published before the death of the author, it is proposed that the present perpetual term be reduced to 75 years after death.

With regard to ownership of copyright it is recommended that the present provisions be retained: that the author is the owner of a copyright in the work, except where works are made under a commission, or during the course of employment. The exercise of copyright ownership is clarified with a clearing away of limitations, mainly of compulsory licences, a reversionary provision, and out-moded printing clauses. The principle and scope of the rights of authors to assign and licence copyright are elaborated and maintained without fundamental change, except the elimination of the right to divide markets in Canada by territory.

Part III then deals with the protection accorded cinematographic works (motion picture films) and recommends substantial changes. It is proposed to provide separate and particular protection for motion picture films and to assimilate videotape to motion picture film for purposes of copyright protection.

(b) Non-Convention Material

Part III then takes up the question of protection of material which the copyright international conventions do not require to be protected: sound recordings, broadcasts, computer programs, published editions of certain works, performers' rights. The recommendations made involve substantial changes in the existing law.

It is proposed to provide protection to sound recordings in accordance with the particular requirements for protection of such subject matter. A performing right (not presently provided) is to be provided only to Canadian sound recordings. In respect of the present compulsory licence presently available to record manufacturers, (i.e., a statutory licence to make a recording of a musical work once the work has been recorded with the consent of the copyright owner) certain changes are proposed. The conditions precedent and subsequent to the granting of the licence would be changed, the scope of the licence reduced, and the method of calculating royalties changed from that of a fixed rate to a percentage, variable at the instance of the (proposed) copyright tribunal.

Protection (new) is recommended for broadcasts in themselves in addition to the protection afforded to the material being broadcast. Protection for computer programs by copyright means is not recommended at this time pending further review.

Protection is recommended for a new category of material, that of published editions of material no longer protected by copyright. Modern printing methods have made it easy to copy published editions of a work and it is considered that there should be protection against a copier reproducing the edition.

Finally, it is recommended that performances of performers be protected, but with the right being restricted to Canadian performers, subject to certain qualifications concerning the operation of the right.

(c) Other "Rights"

The paper then takes up the further uses of protected materials that are "new" and relate to works protected by the Conventions: for example a public lending right and a droit de suite: a fee for each loan of a book; participation by an artist in results of his work. Recommendations are made not to provide such "new" rights by copyright law for reasons centering upon Canada's net-importer status. With respect to information storage and retrieval systems a limited degree of protection is recommended.

In respect of cablevision, specific recommendations are made for the payment of copyright royalties in certain instances and in particular cases: for origination of programs and for simultaneous rediffusion of Canadian broadcasts.

(d) Matters Common to All Protected Matter

Exceptions from exclusive rights are treated in detail. It is not proposed to enlarge the scope of exceptions beyond present limits, except to adapt them to modern methods of use and technical adjustments.

With respect to photocopying, it is recommended no specific changes be made in the law, it being proposed that collective agencies be used to licence those photocopying. This will render it unnecessary to make provisions in the nature of unwarranted exceptions to the right of reproduction.

A number of existing exceptions are the subject of recommendations for modification or deletion, including those dealing with the free use of music at agricultural fairs, or during the course of charitable, religious or similar proceedings. Recommendations are made to permit broadcasting organizations to record or to include in a film (videotape) a copyright work which it is authorized to broadcast, without additional payment to the copyright owner. Such a recording may be used only for the purpose of broadcasting. It is recommended that the present exemption which permits an exemption from paying royalties for the performance of music by juke boxes be repealed.

With respect to infringement of copyright those acts constituting infringement will differ in only minor respects from the new provisions of the existing law. With respect to remedies in a new act recommendations are made to abolish summary remedies on the grounds that the state should not police private rights and the deterrent effect can be achieved by civil remedies. An increase in civil remedies is proposed, together with necessary changes in presumptions.

In the matter of infringement by importation certain basic changes are proposed in the present administrative provisions. It is recommended the present duty and responsibility laid upon Revenue Canada to police certain private rights of owners of copyright i.e. to enforce a ban upon the importation of certain works upon request, be eliminated. The basic provisions in the act, where importation is an infringement, have been retained.

PART IV

Part IV, while concerned primarily with administration of copyright policy and important regulatory aspects, is of significant importance.

The efficacy of the present optional registration system is examined and recommendations are made for its abolition. One ground for abolition is it is not for the state to maintain detailed legal records to enable owners of registration certificates to enforce their rights in court, according to the presumptions created by a registration certificate.

A major solution advanced to the problems of access is that the rights granted by copyright can be exercised collectively to (i) provide a means of securing remuneration to authors and (ii) whereby potential users can secure permission to use material more readily. However, if collective mechanisms are formed, their control and regulation will be necessary to ensure equity between owners and users and protect the public interest, as is presently the case with respect to performing rights' societies. Hence, a recommendation is made to form a regulatory body, a tribunal. Various regulatory duties and responsibilities have been identified in the paper. To provide an equitable balance between owner and user, the establishment of a copyright tribunal is urged, to regulate, for instance, the collective exercise of copyright.

The question of crown copyright, primarily from the point of view of the federal government, is reviewed and recommendations are made that the crown be subject to the copyright law and that the federal government review its interests in crown copyright. Consideration of Canada's accession to international conventions, other than those of which Canada is presently a member, results in recommendations that Canada accede to international agreements covering sound recordings, satellite signals, but not to those agreements covering neighbouring rights or type-faces.

Part IV concludes with a consideration of the need for periodic review of the law and consultation with affected interests.

Recommendations are made for continuing review and periodical assessment of the adequacy of the law, in accordance with the Economic Council's characterizing of the issues arising in copyright law as "rapidly moving targets". It follows that review is necessary to ensure balance in the public interest.

CONCLUSION

In the paper, the public interest is widely construed to take into account the social and economic pressures resulting from technological development and increasing social awareness of the importance copyright plays in the everyday lives of people.

The overall public interest may best be served by recommending, on one hand, a series of changes which defines with more certainty the rights of creators, and which ensures the interests of consumers and users, while, on the other hand recommending that Canada not adhere to later texts of the copyright conventions, thus not increasing unnecessarily the general levels of protection for foreigners.

The paper stresses that the relative importance of copyright may change, but the basic conflict remains: the need to encourage, nurture and reward intellectual creativity as opposed to the needs of society in terms of access to copyright material. The conflict requires resolution by finding the appropriate balance. Attention has been drawn to the wide variety of complex areas involving separate interests within the public and private sectors. Those areas and the problems created by technology, the demands of creators and the interests of the public, coupled with the responsibilities to be met by government, require the development and maintenance of mechanisms for reaching and maintaining equilibria.

ACCOPRESS®

NO. 2507

BF - RED	BY - YELLOW
BG - BLACK	BA - TANGERINE
BD - GREY	BB - ROYAL BLUE
BU - BLUE	BX - EXECUTIVE RED
BP - GREEN	

SPECIFY NO. & COLOR CODE

ACCO CANADIAN COMPANY LTD.
TORONTO CANADA

